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Contracts - Survey of Illinois Law for the Year 1951-1952

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II. CONTRACTS

Little occurred in the general field of contract law during the year to merit attention, but a few cases are worthy of some notice. In one of them, that of Ozier v. Harris, the facts growing out of a sales transaction came close to estopping the defendant from relying on the statute of frauds as a defense to a suit for an alleged breach of contract. A motion to dismiss the action, based on the statute of frauds, was sustained, however, not only in the trial court but also in the Appellate Court on appeal and before the Illinois Supreme Court on certificate of importance. The opinion of the latter tribunal presents a clear cut and precise analysis of the six elements necessary to invoke the doctrine of equitable estoppel, for which reason it merits perusal.

The effect to be given to a release of one joint tortfeasor, made prior to suit or judgment, is generally not a matter of doubt although there may be room for inquiry as to whether the parties concerned are really joint feasors. The Appellate Court for the Fourth District, in McClure v. Lence, has now come to the conclusion that a release given to one for a cause of action resting on the wrongful death statute will serve to bar a subsequent suit against another for the same injury and death based on the Illinois Liquor Control Act. As the right of recovery was there said to rest on the fact of injury and not merely on the sale of liquor, the Appellate Court elected to follow the rule of the Chapin case, although there is at least one decision to the contrary.

In contrast, the effect to be given to a release granted after judgment had been obtained against one of a number of joint tort

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5 Ibid., Vol. 1, Ch. 70, § 1 et seq.
6 Ibid., Vol. 1, Ch. 43, § 94 et seq.
8 Scharfenstein v. Forest City Knitting Co., 253 Ill. App. 190 (1929).
feasors would seem to present a different story. That problem faced the Appellate Court for the First District in the case of Zboinsky v. Wjocik, wherein the plaintiff began an action against several defendants under a complaint containing three counts. The first two counts were predicated upon the Dram Shop Act but a third count, against two of the defendants, rested on a common law action for a malicious battery. The counts were severed by agreement and two of the defendants stood trial under count three. At that trial, a judgment was entered in favor of the plaintiff against one of these defendants but the other was found not guilty. Execution was issued against the judgment debtor and, as the count rested on a charge of malice, he was taken into custody for failure to satisfy the execution. Subsequent thereto, the plaintiff gave a release of general character to the other parties concerned in the transaction. The incarcerated defendant thereupon asked to be released from custody and to have the judgment against him satisfied of record on the theory that the release in question inured to his benefit. The Appellate Court, however, held that inasmuch as one of the released co-defendants had been found not guilty he could not be said to have been a joint tortfeasor and, in addition, the character of the liability of the incarcerated defendant had been changed by the judgment against him. The release was, therefore, ineffective to procure his discharge or the satisfaction of the judgment which had been pronounced against him.

INSURANCE

In specialized areas of contract law, such as insurance, certain other cases merit attention. Mention was made last year of the Appellate Court holding in the case of Canadian Radium & Uranium Corporation v. Indemnity Insurance Company of North America, a suit in which the plaintiff sought to recover money expended in settling a suit against it, brought by an employee.
of a licensee of its process, for injuries caused through the continued handling of plaintiff's product, which was radio-active in nature. A certificate of importance having been granted, the Illinois Supreme Court reversed on the ground that the meaning of the word "accident," as used in the insurance policy, was not to be determined by reference to the meaning given in cases arising under the Workmen's Compensation Act, as had been done in the court below, but had to be established "apart from rules of strict construction applied to statutes in derogation of the common law." Pointing out that the peculiar meaning assigned to the word "accident" in suits under the Workmen's Compensation Act resulted from the notice requirements set out therein, the court said the word "accident" had to be given its plain, ordinary and popular meaning in the case before it, to-wit: "an event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event." The cause was, therefore, remanded in conformity with what appears to be the majority view on the point.

The issue in Lentin v. Continental Assurance Company dealt with the question as to which of two dates was to be deemed

12 411 Ill. 325, 104 N. E. (2d) 250 (1952).
13 The word "accident" has been defined, in workmen's compensation cases, as a happening "traceable to a definite time and place of origin." See the Appellate Court holding in the instant case, 342 Ill. App. 456 at 459, 97 N. E. (2d) 152 at 154. See also Fenn Flow & Wheel Co. v. Industrial Commission, 311 Ill. 216, 142 N. E. 546 (1924); Labanowski v. Hoyt Metal Co., 292 Ill. 218, 126 N. E. 548 (1920); and Matthiesen & Hegeler Zinc Co. v. Industrial Board, 284 Ill. 378, 120 N. E. 249 (1918).
14 411 Ill. 325 at 331, 104 N. E. (2d) 250 at 254.
15 Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.6(c).
the effective date of a non-cancellable accident and health policy, the date set forth in the policy itself or the date of actual delivery to and payment of the first premium by the insured, where the application, expressly made a part of the policy, provided that the insurance was not to be effective until these conditions precedent had been fulfilled. The facts therein, briefly stated, were that on December 4, 1945, plaintiff had applied for the policy, which was issued on the 17th but bore date of December 12th. Delivery was made to plaintiff on or before January 2, 1946, and payment was forwarded to the company on January 4, 1946. In 1949, plaintiff delayed sending his check for the annual renewal premium until January 13th, which check the insurer accepted conditionally, indicating that the policy had lapsed and could be reinstated only by compliance with certain conditions. Plaintiff refused to apply for reinstatement and initiated an action for a declaratory judgment both as to the effective date of the policy and its present status.

The trial court had ruled that, as the provision contained in the application was "an effective and binding clause," the insurance could not be said to have taken effect until all its conditions had been met, to-wit: January 4, 1946, so that the payment of the annual renewal premium was well within the grace period. The Appellate Court for the First District, with one dissent, affirmed that holding on the basis that any ambiguity in the effective date provisions required a construction most favorable to the assured. The Illinois Supreme Court also affirmed.

The defendant had argued that, when a policy specifically states an effective date, such date is to be controlling in determining the due dates of subsequent premiums, without regard to the actual delivery date, and that the fixing of another effective date

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19 The terms of the application are set forth in 412 Ill. 158 at 160, 105 N. E. (2d) 735 at 736.

20 The dissenting judge had rested his opinion on the point that, whatever the general rule might be, the Illinois Insurance Code required that the date stated in the policy should be construed as the effective date. In that regard, Ill. Rev. Stat. 1951, Vol. 1, Ch. 73, § 968(1)(b), states that no policy shall be issued "unless the time at which the insurance thereunder takes effect and terminates is stated in a portion of the policy preceding its execution by the insurer."
by the court would be to change the contract terms. Plaintiff, on the other hand, contended that the only mutually arrived at terms regarding the effective date were those contained in the application. It is axiomatic that if, in fact, the parties have agreed upon a specific effective date, that date is controlling. But what is the rule to be where the parties have not so agreed? Case examination reveals the existence of two views. Some courts favor the defendant's theory that the date stated in the policy "should prevail over the provisions of the application which state that the insurance shall not take effect until delivery, payment of the first premium, etc." Others have reached a contrary result, basing the holding on the proposition that to decide otherwise would compel the insured to pay something for nothing, the premium payment being required for a period during part of which the insured was without coverage.

Only one Illinois case squarely in point could be cited, that of Stragmaglia v. Conservative Life Insurance Company, where the result reached was in accord with the instant decision, but numerous other Illinois cases, not directly in point, can be mentioned to support the view that, where a delivery condition attaches, the date of delivery is the effective date of the policy. The court also experienced no difficulty with the contention that the provisions of the Illinois Insurance Code controlled by


22 This view has been adopted in cases where the only condition dealt with the payment of premiums: McCampbell v. New York Life Ins. Co., 288 F. 465 (1923); New York Life Ins. Co. v. Silverstein, 53 F. (2d) 78 (1935); Pladwell v. Travelers Ins. Co., 134 Misc. 205, 234 N. Y. S. 287 (1928).


26 The text of Ill. Rev. Stat. 1951, Vol. 1, Ch. 73, § 968(1)(b), is set out in note 20, ante.
pointing out that policy construction was made necessary by reason of ambiguity in the policy language. It noted that the statute "cannot [be made to] serve as a cloak behind which the insurer can arbitrarily select an effective date . . . not based upon or consistent with the express agreement" of the parties.27

Trite sayings probably have no place in a dignified law review but the admonition "Never underestimate your adversary" is as much to be followed in the court room as in the boxing ring. The truth of this fact is thoroughly demonstrated by the case of Ballard v. Citizens Casualty Company of New York28 recently decided by the Court of Appeals for the Seventh Circuit. The plaintiff there, having been forced to pay a judgment entered against him in a dram shop case, sued his insurer for reimbursement of that amount by which the judgment exceeded the policy limits, alleging that the insurer breached its duty by failing, through its attorneys, properly to investigate and try the case29 and also by refusing to settle, following an opportunity to do so, within the policy limits. The trial court had found for the plaintiff and the decision was affirmed on the basis there was no adequate reason for not adhering to the rule laid down in Olympia Fields Country Club v. Bankers Indemnity Insurance Company,30 the only Illinois case in point. There is general agreement on the score that a liability insurer which has breached its duty should be made to suffer to the extent of the excess judgment recovered against the insured, but disagreement does exist concerning the degree of proof which the insured must establish before becoming entitled to recover such excess. When adhering to the rule of the Olympia case, one expressing the more liberal

27 412 Ill. 158 at 170, 105 N. E. (2d) 735 at 741.
28 196 F. (2d) 96 (1952).
29 The facts disclosed that the insurer's attorneys had seriously underestimated the ability of their opponent, a neophyte at the bar; had failed to contact a key witness, of whom they had knowledge at an early stage, until two days before the trial at which time she refused to talk; had failed to communicate an offer to settle, for less than the policy limits, to the company; and, while it appeared that an appeal might have resulted in a reversal, allowed the time for filing an appeal bond to expire, although informed that the insured was willing to deposit cash or security for his share.
30 325 Ill. App. 649, 60 N. E. (2d) 896 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 198.
view,\textsuperscript{31} the court expressed the belief that an insurance company, concerned with investigating, defending, settling, or appealing, should "give the interests of the insured equal consideration with its own interests."\textsuperscript{32}

**SALES**

One sales case calls for comment.\textsuperscript{33} In *Keller v. Flynn*,\textsuperscript{34} a farmer purchased certain hogs at an auction sale and, when he paid for the hogs at the sales office, was given a printed sheet which stated, in part, "not responsible for stock after leaving the premises." The hogs were later found to be diseased. In a suit for breach of warranty instituted by the buyer, the seller defended, among other things, that the sheet handed to the buyer amounted to a disclaimer of warranty. The trial court disagreed with that contention, and the Appellate Court for the Second District affirmed, declaring that a disclaimer of warranty would be ineffectual, if made after the contract had been concluded, unless the buyer should assent to the change. There being no evidence that the buyer assented to, or even knew of, the alleged disclaimer, he was not bound thereby.

**SURETYSHIP**

It is rarely the case that one who is surety for the obligations of another comes into open conflict with the creditors whose claims he has guaranteed to pay. If he should do so, as by claiming subrogation, he must yield to the superior equities in favor of the creditors whose claims he has offered to secure, for it would be inequitable to allow him to share in the assets of the principal


\textsuperscript{32} 196 F. (2d) 96 at 102.

\textsuperscript{33} Attention is also drawn to a sales case mentioned above, note 1 ante, concerning the right of a seller to assert the statute of frauds in defense of an action for breach of a sale contract.

\textsuperscript{34} 346 Ill. App. 499, 105 N. E. (2d) 532 (1952).
debtor until the debt he set out to protect has been paid in full.\textsuperscript{35} That view has now received additional sanction by the decision in \textit{Willis v. Fidelity \& Deposit Company of Maryland},\textsuperscript{36} a case which grew out of the financial collapse of a community currency exchange which had been operating under a statutory license.\textsuperscript{37} After insolvency and the appointment of a receiver, the paid surety was asked to make good on an insurance policy it had issued, designed to protect the exchange from loss by embezzlement or the like.\textsuperscript{38} It endeavored to offset against its liability thereunder the amounts which it had paid in favor of the holders of money orders issued by the exchange pursuant to the terms of a license bond which it had also issued.\textsuperscript{39} The court denied the right to such an offset, following the theory aforementioned, treating the surety's obligation as being one, whether under either or both instruments, to pay the losses in full to the extent agreed before becoming entitled to indemnity or reimbursement. It also held that orderly administration of the receivership proceeding required that full payment should be made by the surety of its obligation, with privilege to file a claim for refund, rather than to permit the surety to make its own deduction and pay in only the net difference.\textsuperscript{40}

The rights of a surety-pledgor were involved in \textit{Holyoke v. Continental Illinois National Bank \& Trust Company}\textsuperscript{41} for the financial institution there concerned, having a matured credit due it for money loaned to a parent, granted an extension on the


\textsuperscript{36} 345 Ill. App. 373, 103 N. E. (2d) 513 (1952). Leave to appeal has been denied.

\textsuperscript{37} Businesses of that character are regulated pursuant to Ill. Rev. Stat. 1951, Vol. 1, Ch. 16, § 30 et seq. The court held that the amendments thereto, made by Laws 1951, p. 551, were inapplicable inasmuch as the several claims arose prior to the effective date of the revision.

\textsuperscript{38} Insurance against such risks is now required by Ill. Rev. Stat. 1951, Vol. 1, Ch. 16½, § 36.

\textsuperscript{39} Provision for a license bond appears in Ill. Rev. Stat. 1951, Vol. 1, Ch. 16½, § 35.

\textsuperscript{40} To that extent, the court differed from the procedure outlined in Mack v. Woodruff, 87 Ill. 570 (1877). The court there, while denying setoff, permitted the surety to retain its pro-rata share and compelled payment only of the balance thereafter due the insolvent estate.

\textsuperscript{41} 346 Ill. App. 284, 104 N. E. (2d) 838 (1952).
basis that both the parent and his daughter, the latter acting as surety or guarantor, would each deposit individual collateral securities to cover the loan. When further default occurred, the bank realized from the sale of the daughter’s collateral and thereafter surrendered to the parent the securities which he had deposited. The daughter claimed that such conduct amounted to a conversion of her property, on the theory that the principal debtor’s collateral should have been exhausted first, or else violated her right to secure subrogation from the parent’s collateral which, she claimed, should have been retained for her benefit. A trial court decree denying relief to the daughter was, in this respect, affirmed by the Appellate Court for the First District on the ground the terms of the secured note authorized the pledgee to sell any or all of the collateral so deposited without restriction and, in the absence of agreement to the contrary, there would be no obligation in law forbidding a surrender by the creditor to the principal debtor of the collateral which he had furnished after satisfaction had been obtained by the creditor. There is little that can be criticized as to the first part of the holding for permitting the creditor to have recourse to any part of the collateral merely effectuates the creditor’s purpose in seeking security. The second point has some support in law, but not without criticism, for it would seem to follow, as a correlative from the creditor’s obligation to preserve the security for the surety’s benefit in case subrogation arises, that the creditor should do nothing to put the pledged collateral beyond the surety’s reach.

Other issues of law involving elements of suretyship arose in connection with bankruptcy matters but, being peculiar to federal law or resting upon particular federal statutes, fall beyond the ambit of this analysis of state law, hence are not here discussed.